

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1241

DOUGLAS FOODS CORP.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Douglas Foods Corp. ("the Company") to review an order of the National Labor Relations Board ("the Board"). The Board has filed a cross-application seeking enforcement of its order. The Board's Decision and Order issued on March 13, 2000, and is reported at 330 NLRB No. 124.¹

¹ "A" refers to the joint appendix. "SA" refers to the supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended, (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(f)).

The Board's order is a final order under Section 10(f) of the Act (29 U.S.C. § 160(f)). The Company filed its petition for review on June 8, 2000. The Board filed its cross-application for enforcement on July 24, 2000. Both were timely filed, as the Act imposes no time limitation on filing for review or enforcement.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its decision and order, in which the Board found that the Company violated Section 8(a)(3) and (1) of the Act by creating the impression or increasing the scrutiny of employee Beck's work performance, by decreasing Beck's overtime, and by issuing Beck a disciplinary notice, all in retaliation for Beck's union activities.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by engaging in numerous acts of coercive conduct, including

creating the impression among its employees that their union activities were under surveillance, threatening and coercively interrogating employees regarding their union activities and the union activities of other employees, and threatening employees with adverse consequences if they selected the Union as their bargaining representative or honored Board subpoenas.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by firing employee Benkert, laying off employee Beck, and by ceasing its hot truck catering operations and terminating the employment of its hot truck drivers and cooks.

4. Whether the Board acted within its broad remedial discretion in ordering the Company to bargain with the Union as a remedy for its unfair labor practices and to reinstitute its hot truck operations.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in an Addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by Local 876, United Food and Commercial Workers Union, AFL-CIO-CLC ("the Union"), the Board's General Counsel filed a complaint alleging that the Company committed numerous violations of the Act and seeking, among other remedies, the issuance of a bargaining order. (A 121-30.)

The Company filed an answer denying the allegations and opposing the relief sought. (A 136-45.)

On March 6, 1998, following a hearing, a Board administrative law judge issued a decision and recommended order, finding merit to the complaint allegations. (D&O 6-26.) The Company filed exceptions to the judge's decision. (Exceptions.) On March 13, 2000, the Board issued its decision and order affirming the judge's decision and adopting his recommended bargaining order. (A 72-77.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations

The Company is in the mobile food catering business. It operates out of a facility in Garden City, Michigan. Douglas George, who founded the Company in 1963, is the Company's owner and serves as its president. (A 78; 29, 44, 735, 740, 1719-20.)

In the mid-1970s, the International Brotherhood of Teamsters represented the Company's drivers. The drivers, who worked on lease, sold prepackaged cold food from company-owned trucks ("cold trucks"), on routes assigned by the Company. (A 78; 703-24, 740, 744-51, 1738-44, 1880-83.) In 1978, the Company sold most of the service routes to the drivers and terminated its bargaining relationship with the Teamsters. (A 78; 747-52, 1744-50.)

In the mid-1980s, the Company repurchased some of the cold truck routes, developed new routes, and began operating larger trucks containing a kitchen for the preparation of hot foods ("hot trucks"). (A 78; 680-82, 702, 740, 752-53, 903-05, 1627, 1706, 1720, 1722, 1725-28, 1751, 1754-55.) At that time, the Company's drivers paid a "daily lease fee" for their trucks and routes. The lease fees varied from \$0 to \$150, depending on the route's total sales. (A 78, 90; 211-14, 311-14, 751-52, 759-60. 811-12, 843-44.) The Company retained the right to unilaterally alter the lease rates, and to unilaterally alter the routes. Routes did not "belong" exclusively to individual drivers; the Company regularly assigned different drivers to service the same customer at different times of the day. (A 78, 90; 211-14, 747-48, 813, 817-21, 829, 837-42, 849-52, 857-60, 871-75, 888-91, 893-95, 908-13, 923-24, 940-42, 962, 976-78, 1147, 1321, 1363-64, 1628-31.) All of the trucks prominently bore the Company's name, logo, and telephone number, and all were garaged nightly at the Company's facility, where the Company both maintained and cleaned them. (A 78; 784-87, 831-32, 1621-22.)

Drivers of both cold and hot trucks purchased all of their food and supplies from Ezzo's Food: Ezzo's Food was owned by company owner Douglas George; managed by his wife, Laura George; and located at the company's facility. The drivers' food and supply purchases were based on the Company's computer-generated

summary of prior purchases. All company drivers were subject to the same dress code; the drivers, their product, and their trucks were subject to occasional on-site and off-site inspections by Company President George and Company Sales Manager William Tofilski. Drivers sold food at prices set by the Company and the trucks contained a company priceboard. The drivers earned whatever they collected from the sale of food less their daily lease fee, their purchases from Ezzo's Food, sales taxes, and a service fee for truck cleanings. (A 78, 90; 157, 209, 751-52, 761-62, 798-801, 819-20, 824-25, 831-37, 848-58, 907-10, 914-17, 921-24, 948-52, 963-65, 976-78, 985, 1258-59, 1319-21, 1360-64, 1384, 1391-92, 1400, 1525-26, 1528, 1623-26, 1946, 1958-59, 1968, SA 11.)

By mid-1995, the Company operated about 12 cold trucks and 12 hot trucks. Each of the hot trucks was staffed by, in addition to the driver, a company-employed cook. Drivers of hot trucks paid the Company an additional "labor fee" for their cooks. Some independently owned trucks also operated out of the garage. (A 78, 90; 680-82, 702, 740, 752-53, 845-47, 903-05, 963, 1627, 1706, 1720, 1725, 1727-28, 1751, 1754-55.)

In the spring of 1995, the Company converted about half of the hot truck drivers to an hourly wage. Whether hourly or lease, however, Sales Manager Tofilski occasionally altered those routes and assigned overtime, making no distinction

between hourly and lease drivers. (A 78, 90; 223-39, 244-45, 249-50, 762-63, 813, 841-42, 857-60, 871-79, 888-91, 912-13, 976-78, 985, 1363-64, 1384, 1424, 1526-28, 1558-63, 1628-32, SA 38-46.)

In October 1995, the Company sold its cold trucks and cold truck routes to Laura George's brother, Company General Manager John Schemanske. Schemanske created JK Food Service to operate the cold trucks, which he ran out of his old office at the Company's facility. The cold truck drivers continued to purchase all of their food and supplies from Ezzo's Food; the trucks continued to bear the Company's name, and the Company continued to garage and maintain them. (A 78; 777-82, 785-86, 791-93, 892-93, 903-04, 1207-10, 1218-25, 1227-33, 1731-32.)

B. The Company Begins an Expansion of Its Facility;
the Union Begins an Organizing Campaign

In April 1996, the Company broke ground on an \$800,000 expansion of its facility. The planned expansion, from 15,000 to 40,000 square feet, included enlarging the garage from 12 to 60 spaces for trucks, and expanding the store area from which the Company distributed food to the drivers. (A 78; 200-207, 740-44, 822-23, 1621, 1714-15, 1733-36.) In June, the Company bought a hot truck route from independent driver Barry Karras. (A 87; 1892-96, 1903-07.)

In the meantime, in late 1995 or early 1996, company driver Debra Beck contacted the Union about starting an organizing campaign. (A 78; 1510-11, 1521-22.) Between April and June 1996, the Union held several organizational meetings for company employees. Beck and her cook, Michelle Benkert, lease driver Jennifer Tjernlund and her cook, Eve Orlando, and hourly driver Kimberly Brackenrich signed union authorization cards. Those five employees spoke about the Union and distributed authorization cards to other company drivers, cooks, and mechanics, to Ezzo's Food store employees, and to drivers of JK Food Service. (A 78, 83; 215-16, 317-18, 348-49, 352, 533-34, 683, 939, 981, 986-90, 1269, 1423, 1520-24, 1532, 1940-41, 1946-48, 1953-57, 1959-64, 1972-75, 1977.)

Sometime in June, Company President George learned that there was "some unrest" and "problems" that "need[ed] to be dealt with." (A 754-55.) At the end of June, Company Sales Manager Tofilski approached employee Beck while she was cleaning out her hot truck and asked if she knew anything about the "union bullshit." After Beck denied knowledge, Tofilski asked her to "keep her eyes and ears open" and to let him know if she heard anything. (A 80; 666-79, 1529-30.) Over the next few months, Tofilski reported what he learned about the organizing drive to President George. (A 81; 1352, 1781-82.)

On July 1, employees Beck and Benkert encouraged Lisa Bowman, who started that day as a trainee on their truck, to sign an authorization card. She signed a card in their presence. Afterwards, Bowman told her friend Pam Cummins, who was an independent operator of a cold truck. Cummins, in Bowman's presence, called Tofilski to tell him about the card signing. Bowman also spoke to Tofilski. (A 80, 83; 537-38, 1096-98, 1612-13.) Shortly thereafter, Bowman spoke to Company President George and told him about being solicited and signing a card. (A 80, 83; 1613-15, 1633.)

By July 3, 19 company employees had signed union authorization cards. (A 78; 215-16, 317-18, 347-59, 434-39, 527-42.) On that date, the Union filed a petition with the Board, naming the employer as "Douglas Foods/J&K Foods" and seeking to represent the drivers, cooks, mechanics, maintenance personnel, and store employees. The Union also requested that the Company recognize it as the employees' representative; the Company refused. (A 78; 103, 148, 754-56, 1976.)

C. After the Union Files a Representation Petition, the
Company Threatens Closure and Engages in Other
Coercive Conduct

Shortly after the Union filed the representation petition, Sales Manager Tofilski told employee Beck that he knew about a union meeting held in the pool area of employee Tjernlund's apartment complex. Tofilski told Beck that she, Tjernlund,

Orlando, and Benkert attended the meeting. (A 80; 989-92, 1014-15, 1531-32.) Around the same time, Beck began finding crumpled up paper towels in her truck, which Tofilski told her were President George's "calling card[s]" from truck inspections. (A 87; 757-58, 994-96, 1004-07, 1016-17, 1322, 1358-59, 1533-35.)

On July 19, Sales Manager Tofilski approached lease driver Brackenrich and told her that he could not perform his sales job because of the "union bullshit." (A 78-79; 503.) Tofilski then asked Brackenrich if she had signed an authorization card. After Brackenrich admitted signing a card, Tofilski asked why she was interested in the Union. Brackenrich explained her need for health care benefits. Tofilski replied that President George could not afford to provide health benefits, and that if the organizing effort succeeded George would not bargain about benefits but would close, leaving employees without jobs. (A 79; 503-04.) Tofilski elaborated, telling Brackenrich that George had closed shop in 1978 and would do so again to prevent employees from organizing. (A 79; 506, 1346-49.) Tofilski said that if the Union went on strike, George would not let her cross the pocket line even if she wanted to, and that a strike would lead George to close the facility. (A 79; 504.) Tofilski added that George "could close down and live fine"; he told Brackenrich to "think about [your] decision, because where else can you make \$500 per week." (A 79; 506, 1429.)

Tofilski then stated that he knew which company cooks and drivers had signed authorization cards, but asked how many JK Food Service employees had signed cards. (A 79; 504.) Tofilski stated that he also knew that Tjernlund and Beck had started the union effort, and that they, Orlando, and Brackenrich were "involved in this union shit to [their] eyebrows." (A 79; 505, 1426-27.) Tofilski indicated that he knew where the employees held union meetings and what they did. He then told Brackenrich to get her "union pals" together and have a meeting to discuss what he was telling her. (A 79; 506, 1429.)

At some point during the conversation, Tofilski placed his hands on Brankenrich's shoulders and told her that if she specifically mentioned their conversation to her "union pals," he would lie in court and state that it never happened. (A 79; 504-05, 1423.) Around the same time, Tofilski also told Brackenrich that the Company would conduct more intense inspections of the trucks if the Union won the election. (A 79; 1354.)

On July 19, Tofilski approached lease driver Tjernlund and began a conversation by stating, "if somebody asks me about this conversation [it] never happened . . . I'll lie under oath . . . I'll do whatever it takes." (A 80; 240.) Tofilski then said that he had been subpoenaed to attend the Board's representation hearing; he pointedly told Tjernlund, "I know

you're a part of this." (A 80; 240.) Tofilski then stated, "I have rules and regulations that tell me what I can say and cannot say. So, I'm going to tiptoe around those and I think you'll get the gist of what I'm trying to say. Does everybody out there understand what'll happen if the union comes in the shop?" (A 80; 240.) Tofilski continued, "I'm gonna be fine [, but] lease operators are gonna get fucked." (A 80; 245.) Tofilski also stated that the Company would require the employees to account for waste, which would cut their pay by 50 percent. (A 80; 247.)

Tofilski then asked Tjernlund several times what she thought the Company's employees would do. Tjernlund replied each time that she did not know. (A 80; 247-48.) Tofilski then asked, "what have you heard?" (A 80; 248.) Tjernlund replied, "[George is] gonna close the door, [He is] gonna . . . sell all the routes like he did last time." (A 80; 248.) Tofilski then stated, "That's what he did in [19]78." (A 80; 248.) In response, Tjernlund asserted that George had too much invested in the expansion to close. Tofilski replied that George could make a lot of money by selling the routes, and that George would finance Tofilski's purchase of the routes. (A 80; 248.)

On July 22, Tofilski told Brackenrich and cook Michelle Benkert to "go for the Union" because "he needed a change in jobs anyway." (A 88 and n.34; 298.) He then asked "[w]hy [is]

everybody[] so hush about [the Union]." (A 88; 298.) Tofilski noted that President George had money in the bank and would do fine, and that he could sell the routes and become a "wholesale house." (A 88; 300, 1355-57.) Brackenrich asked who could afford to buy the routes; Tofilski replied that he would buy them and then, to avoid the Union, hire all new employees on lease status. (A 88; 300-01.) Sometime in July, Tofilski told Beck that if he started his own company he would not hire her. (A 80; 1323, 1350.)

- D. President George Threatens Beck with the Loss of Her Job if She Complies with a Board Subpoena; when the Parties Enter into an Election Agreement, the Company's Attorney Tells the Union that the Company Will Sell the Hot Truck Routes; President George Threatens the Lease Drivers Regarding the Consequences of Unionization, but Gives Another Employee a Raise To Encourage Her to Vote Against the Union

About July 19, employees Beck and Tjernlund went to President George to discuss their subpoenas for the Board's representation hearing scheduled for July 22. Tjernlund informed George that she had arranged for a substitute to drive her truck that day, and Beck suggested three employees as potential substitutes for her route. George stated that two of the three were already scheduled to work that day. George initially refused to let the third employee, Barbara Paquette, substitute, telling Beck that he would park her truck for the

day and that she would not have a job when she returned. (A 81; 88-82, 883-87, 1536-43, 1580-82.)

On July 22, the parties entered into an election agreement with the Board that covered all hourly and lease drivers, cooks, mechanics, maintenance, and store employees. The parties agreed that the Company's and JK Food Service employees constituted separate bargaining units; they further agreed that the lease drivers were included in the bargaining unit solely for purposes of the election proceeding. Elections for the employees of the two companies were scheduled for August 22. (A 81; 149-50, 691.) During the negotiations for the agreement, company counsel Frank Mamat told union counsel David Radtke and union organizer Mark Charette that the Company was going to sell its routes. Radtke asked Mamat if he was making a threat, but received no response. (A 81; 1760-61, 1786-87, 1969-71.) On July 24 and 30, the Union filed unfair labor practice charges alleging, among other things, that Tofilski's remarks to employees about the campaign violated the Act. (A 82; 104-06.)

During August, President George held about five mandatory-attendance meetings with drivers to discuss the upcoming election. (A 82; 194-99, 758, 802-03, 807-08, 863-64, 896, 1058-64, 1544-56, 1577-79, 1629, 1670, 1674-75, 1789-90.) Some employees, including Beck and Benkert, wore union buttons. (A 158, 867-71, 1058-64, 1268, 1549-50, 1491-93, 1941-43.) Laura

George observed several employees wearing the buttons. (A 1688-89.)

At one of the meetings, President George told the lease operators "they would have a problem retaining that relationship and yet be involved in a union contract that would have anything to do with wage[s] and hour[s] or wages and benefits." (A 82; 900-02, 1714, 1884.) At one meeting, Laura George spoke about the percentage of employees required to approve a strike. Employee Beck spoke up to correct her. (A 1062-64, 1549-50, 1573, 1671, 1676, 1945.)

On about August 5, President George summoned cook Ebtisam Kassouma to his office. George told her that he was going to raise her salary by 23 cents per hour, and encouraged her to vote against the Union. (A 82; 1270-74, 1276-80, 1909-10.)

E. The Union Loses the Election; the Company Reduces Employee Beck's Overtime and Removes Her from a Saturday Route

In the August 22 election, the Company's employees voted against union representation by a vote of 16 to 12, with 2 challenged ballots. Employee Beck served as the Union's observer. The Union also lost the election at JK Foods (A 83; 151-53, 809, 1241.) The Union filed objections to the election and an additional unfair labor practice charge. (A 83; 107-35, 154-56.)

Shortly after the election, Sales Manager Tofilski spoke with employee Beck and criticized her sales figures from an overtime route that she had been driving 2 nights per week for approximately 6 months. He then removed her from the route. (A 87; 543-80, 1558-63, 1576-78.) Prior to the election, Beck often worked 10 hours or more a week of overtime, earning approximately \$600 per week. After the election she never worked more than about 3 hours of overtime, and she earned approximately \$485 per week. (A 87; 543-80, 1558-63.)

F. The Company Announces the Sale of Some Trucks and Truck Routes, and Lays Off the Drivers and Cooks Who Worked on Those Routes; Purchasers Tofilski and Merollis Operate the Trucks for Months Without Entering into an Agreement with the Company

In late September, President George held a meeting for all employees at which he announced that Sales Manager Tofilski and Tofilski's sister, Mary Jo Merollis, who had previously worked for the Company and then rejoined it earlier that year as a lease driver, had each agreed to purchase three of the hot trucks and hot truck routes. George told the employees that there was no cause for concern about their jobs, and suggested that they talk to employees of JK Food Service to confirm his statement. (A 83; 1019-22, 1025-26, 1050-51, 1285-86, 1568-69, 1944.)

Over the next several weeks, Tofilski worked as a substitute driver on different truck routes. In late October,

Tofilski reached a verbal agreement with President George on the purchase price for the three hot truck routes. (A 1297-98, 1333-35.) On October 26, cooks Kassouma and Jennifer McGeough signed papers indicating that they were employees of Tofilski's Patriot Catering, rather than the Company. (A 88; 479, 1275, 1310-11.) Thereafter, Tofilski drove one truck, and had drivers of the other two trucks pay him a "lease fee" of \$150 per day. The Company collected that fee. (A 88; 1592-94, 1308-10.)

The three catering routes ostensibly purchased by Tofilski continued to be operated as they had before. The drivers and cooks received the same rate of pay, serviced the same customers, and performed the same duties. (A 440-63, 1260-67.) The trucks carried the company logo, and at least two of the trucks also carried the Company's menu board and telephone number. The Company continued to service the trucks. Tofilski drove one of the trucks and maintained an office at the Company's facility. (A 88; 440-69, 1260-67, 1291-93, 1327-28, 1344-46.)

In October, Merollis continued driving for the Company while she negotiated the purchase of her three routes. (A 1050-51.) Merollis drove the truck on one of the routes, formerly assigned to lease driver Ann Pape, and directed Pape to cook. (A 88, 91; 943-47, 957-58, 1030-31.) The following week, the Company terminated Pape's lease for selling food not purchased

from the Company. (A 86 n. 29; 953-57, 959-61, 1031, 1049.) The other truck routes were handled by the employees who had handled them for the Company. Merollis, like Tofilski, maintained an office at the Company's facility. (A 1045-46, 1052-53.)

In January 1997, Tofilski and Company President George signed an agreement dated October 21, 1996. (A 88; 1297, 1330-31.) Under the agreement, the Company financed the purchase of the catering routes, without requiring any downpayment. (A 88; 159-70, 177-79.) The agreement required Tofilski to make weekly payments of \$1015, approximately \$67 per day for each route. (A 88; 177.) Tofilski also signed a supply agreement (A 171-76) and a security agreement (A 180-89).

The supply agreement required Tofilski to purchase at least 75 percent of his food from the Company and to "use similar methods of service, purchase, sale, management, accounting and operation as used by [the Company] prior to the date of Agreement." The Company promised not to compete with Tofilski as long as he continued to conduct his business in that manner. (A 88; 171-76.) The security agreement gave the Company a security interest in Tofilski's trucks and catering routes. Under that agreement, Tofilski could not dispose of any trucks or routes without the Company's approval; he was also required to submit any records requested by the Company with respect to

the routes or the trucks. (A 88; 180-89.) The agreement also allowed Tofilski to return all trucks and routes to the Company prior to September 30, 1997, with all outstanding debt to the Company forgiven. (A 88; 165, 1296-97, 1336-37.)

On January 31, 1997, Merollis executed similar agreements for the purchase of three hot truck routes. (A 88; 324-42, 344, 347, 1050-51.) The Company financed the purchase on the same terms as its sale to Tofilski, leaving Merollis with weekly payments of \$794.94, equivalent to a daily fee of approximately \$88 for each truck. (A 88; 345, 1026-28, 1041.) Merollis also signed a supply agreement. (A 88; 333-42.) All three trucks continued to carry the Company's telephone number. (A 88; 1042-43.)

G. The Company Fires Benkert and Issues a Warning to Beck; After the Board Issues a Complaint, the Company Sells Beck's Route to Cummins and Lays off Beck

In early October, the Company issued a revised timeclock policy requiring employees to punch in no earlier than 10 minutes, rather than 15 minutes, prior to their scheduled arrival time, and to punch out no later than 10 minutes after their departure time. (A 84; 208, 319.) The revised policy followed a settlement of litigation between the Company and the United States Department of Labor, requiring the Company to pay overtime to employees who punched in or out more than 10 minutes from their scheduled arrival or departure time. (A 84; 1769-70,

SA 12-17.) On October 14, Benkert punched in 13 minutes before her scheduled arrival time of 5:25 a.m. That afternoon, she received a memo from Office Manager Linda Clark informing her that her punch-in time was between 5:15 and 5:25 a.m., and that "anything else is unacceptable." (A 84; 320.) On October 18, Benkert punched out 17 minutes after her scheduled departure time. (A 84; 321-23.) On October 23, President George summoned Benkert to his office and fired her for punching out 7 minutes late. (A 84; 997-99, 1001-02, 1944.)

On October 24, the Company issued a warning to employee Beck, allegedly for misstating the number of double versus single hamburgers sold in an attempt to gain unearned reimbursement from the Company. (A 86 n. 28; 526, 764-67, 1512-19, 1564, 1616-17.) Around the same time, President George and Beck held a work-related conversation. During the conversation, Beck touched George's shoulder. George stated that if she ever touched him again, he would punch her in the face. (A 85; 1573-74, 1843.)

On October 31, the Board's Regional Office issued a complaint alleging that the Company had committed unfair labor practices. The Board also issued an order consolidating for hearing the unfair labor practice case with the Union's election objections. (A 107-20.)

On November 22, Pam Cummins, an independent operator of a cold truck route purchased from the Company in August 1995, purchased the hot truck and hot truck route then being driven by employee Beck. Cummins signed an agreement provided by the Company without making any changes to it. (A 1066-67, 1086-90.) The Company financed the purchase, without requiring any downpayment. Cummins owed \$416.77 per week, the equivalent of \$83.35 a day. (A 85; 256-65, 380-82, 1099, 1116.) Cummins also signed a supply agreement (A 365-70) and a security agreement (A 371-79). The supply agreement, among other things, required Cummins to purchase food exclusively from the Company. (A 86; 365.)

That same day, Company President George summoned Beck to his office for a meeting at which Laura George and Office Manager Clark were also present. President George told Beck that he had sold the truck and catering route she worked on and that he had no job for her. The day before the meeting, the Company had placed an advertisement in a local newspaper seeking catering route operators. (A 85, 87; 146-47, 767-68, 776, 1565-67, 1583-84, 1651.)²

² The advertisement did not mention the employer, but listed the Company's address. (A 85; 146-47, 1103.) The listed telephone number connected to John Schemanske's office, which is located next to Douglas George's office. The same phone number also connected to Clark and Donna Riggio, a company clerical employee. Riggio answered all phone calls in response to the

Cummins continued to operate the truck, previously driven by Beck, out of the Company's facility. Barbara Paquette, the cook who had worked with Beck, continuing to do the cooking. (A 85; 1101-03.) Cummins hired a friend, Cheryl Foster, to drive the truck in return for a \$125 daily lease fee. Foster paid the fee directly to the Company. Foster bought food from the Company and turned into the Company the difference between her sales and the food purchases. At the end of the week, Cummins received a company check that subtracted her loan payment and left her with money to pay Paquette and Foster, and to pay the Company for truck maintenance. (A 87; 364, 1070-73, 1076-84, 1115-18, 1122-24.)

H. Cummins Returns Her Truck and Route to the Company;
Kurzwa Purchases the Truck; Tofilski Returns Two of
His Trucks and Routes

In a letter to President George dated February 22, 1997, Cummins sought permission to return her truck and route, and to have the loan balance forgiven. Cummins offered to forfeit all payments made. Cummins', letter stated that Karen Mitchell Kurzwa, who had worked for the Company off and on since 1990, was interested in buying the truck and her route. George agreed to take back the route. (A 87, 89; 383-84, 934-35, 1073-76, 1084-85, 1091-95, 1099-1101, 1125-26, 1149-50.)

ad, and offered callers employment applications for JK Food Service. (A 85; 769-75, 783, 788-90, 1226, 1230-33, 1606-11.)

On March 4, after operating Cummins' former route for about 10 days, Kurzwa purchased the hot truck route from the Company. Cummins had no role in Kurzwa's purchase. Kurzwa made no changes to the papers provided her by the Company, and purchased the truck and the route under essentially the same terms as Cummins. Kurzwa also agreed to purchase all of her food from the Company. (A 89; 365-70, 385-412, 932-33, 1131-34.) Kurzwa worked with the same cook who had worked with Cummins, and operated with the same work schedule and customers. The Company's logo and telephone number remained on the truck. Kurzwa displayed a company menu board and charged the Company's suggested prices. The Company performed all maintenance on the truck. (A 413-16, 1073-75, 1133-48, 1152.)

On March 29, Sheila Thomas purchased the truck and route that she had operated on lease from the Company since the summer of 1996. She made no downpayment, and the terms were generally the same as Cummins' and Kurzwa's. (A 89; 1405-11.) Kelly Alman continued working as her cook, receiving the same wage. Alman ordered all of the food for the truck from the Company. (A 89; 490, 1408-09, 1416-18, 1420-22.) Thomas continued to operate the truck out of the Company's facility and to have the truck serviced by the Company's mechanics. (A 89; 252-55, 485-88.)

On March 29, John Schemanske, who had previously purchased the Company's cold trucks, signed a contract with the Company to take over the hot truck route that Kurzwa had been leasing before she bought Cummins' route. Schemanske made no downpayment, and paid the equivalent of approximately \$53 per day for the route. (A 89; 1207, 1210-14, 1218-20.) As of July 17, Schemanske had not made any payments. (A 89; 1212.) Schemanske continued to serve the same customers and to purchase food and maintenance services from the Company. (A 1213-18, 1234-46.)

In July, Tofilski, who had ostensibly purchased three of the hot trucks and hot truck routes the previous October, returned two of the trucks to the Company; all remaining amounts owed to the Company were forgiven. (A 88; 1324-26, 1335-43.) The Company entered into an agreement to sell one of those trucks to Dawn Alman, who had been a cook on the truck for the Company, and then for Tofilski. Alman's purchase required her to pay the equivalent of \$84 per day and to purchase all of her food from the Company. The Company operated the second truck itself. (A 88; 1324-26, 1340-43, 1430-31.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Fox, Liebman, and Hurtgen) found, in agreement with the administrative law judge, that the Company violated Section

8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by creating an impression of surveillance among its employees that their union activities were under surveillance, threatening employees with adverse consequences if they supported the Union, coercively interrogating its employees about the Union, suggesting that it would be futile for employees to join the Union, threatening an employee with adverse consequences if she honored a Board subpoena, and giving an employee a pay raise to induce her to vote against the Union. (A 72, 96.) The Board, with Member Hurtgen dissenting, found that Company President George committed one of the Company's unlawful interrogations and threats. (A 72, 75, 96.)

The Board also found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by increasing the scrutiny of, or creating the impression of increasing the scrutiny of, employee Beck's work performance, decreasing her overtime, issuing her a warning, and laying her off, and by closing its hot truck operations and terminating the employment of its hot truck drivers and cooks. (A 72, 96.) The Board, with Member Hurtgen dissenting, also found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(3) and (1)) by discharging employee Benkert. (A 72, 75, 96.)

To remedy the Company's unfair labor practices, the Board's order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 96.) Affirmatively, the Board's order requires the Company to make whole any hot truck drivers or cooks for loss of earnings caused by the Company's discriminatory termination of their employment. The Board, with Member Hurtgen dissenting, also ordered the Company to bargain, upon request, with the Union, and to resume its hot truck operations as they existed prior to October 1, 1996. (A 72, 75, 96.)

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of the unfair labor practices found by the Board that are not contested by the Company. Those violations, including creating or increasing the scrutiny employee Beck's work performance, decreasing her overtime, and issuing her a warning, all in retaliation for her union activities, are also probative of the Company's motivation with respect to the remaining, contested violations.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by engaging in numerous additional acts of coercive conduct. Threats to close, coercively interrogating employees about their union activities,

and creating the impression that employees' union activities are under surveillance all constitute clear violations of the Act.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Benkert, laying off employee Beck, and ostensibly selling its hot truck operations to company employees and supervisors, which led the Company to terminate the employment of all of its cooks and drivers. Benkert and Beck were known union supporters and the Company's discharge of them occurred while the Union's election objections were pending, and against the backdrop of the Company's demonstrated antiunion animus. The Board also reasonably found that the Company failed to show that it would have engaged in the same actions absent its unlawful motivation.

The Company's sales of its hot trucks took place in the same period. Its repeated threats to sell its operations, the statement by the Company's attorney to that effect, and the nature of those sales transactions themselves, provide further evidence for the Board's finding that those sales were unlawfully motivated.

The Board reasonably found that the Union established that it had majority support among the employees based on authorization cards, and it reasonably rejected the Company's attempt to expand the number of employees included in the

appropriate unit. The Board's issuance of a bargaining order is also amply warranted here. The Company committed serious unfair labor practices, including threats to close, discharges of prounion employees, and the sale of its hot truck operation and subsequent layoff of all employees involved in that operation. Significantly, the Company's unfair labor practices continued after the election, and many were committed by its owner. The severity and pervasiveness of the Company's violations supports the Board's finding that traditional remedies would be unlikely to dissipate the effects of the Company's unlawful conduct.

Finally, the Company has failed to show that the Board's restoration order, requiring it to reinstate its hot truck operation, is an economic burden. To the contrary, the Company has continued to operate essentially the same enterprise, albeit in a disguised form, and it failed to provide specific evidence that the restoration order would necessitate a substantial outlay of capital or otherwise cause financial hardship.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER, WHICH REMEDY SEVERAL VIOLATIONS OF THE ACT DIRECTED AT EMPLOYEE BECK

In its opening brief to this Court, the Company does not contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(3) and (1)) by increasing

the scrutiny of, or creating the impression of increased scrutiny of, Beck's work performance, by decreasing Beck's overtime, and by issuing Beck a warning. Accordingly, the Company has waived any defense to those findings, and the Board is entitled to summary enforcement of those portions of its order respecting them. See Corson and Gruman Co. v. NLRB, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

Moreover, the uncontested violations "do not disappear by not being mentioned in [the Company's] brief. They remain, lending their aroma to the context in which the [remaining] issues are considered." NLRB v. Clark Manor Nursing Home Corp., 671 F.2d 657, 660 (1st Cir. 1982).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1)

A. Introduction and Applicable Principles

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). Section 7, in turn, grants employees "the right to self-organization, to form, join, or assist labor organizations." The test of whether the employer's conduct violated Section 8(a)(1) is not whether employees were actually coerced, but whether the conduct had a reasonable tendency to coerce employees. Teamsters Local 171 v.

NLRB, 863 F.2d 946, 954 (D.C. Cir. 1988), cert. denied 490 U.S. 1065 (1989). It is well settled that an employer violates Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by coercively interrogating its employees about their union sympathies and activities (Perdue Farms, Inc., Cookin' Good Div. v. NLRB, 144 F.3d 830, 835 (D.C. Cir. 1998) ("Perdue Farms") (listing relevant factors)); by making threats of plant closure or other reprisals in response to the employees' union activity, where the threats are not based upon economic necessities or objective factors beyond the employer's control (Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354, 1364-66 (D.C. Cir. 1997)); by surveilling or creating the impression of surveillance of its employees' union activities (Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257, 266 (D.C. Cir. 1993)); and by granting benefits to employees in order to influence their union activities or vote (General Electric Co. v. NLRB, 117 F.3d 627, 636-37 (D.C. Cir. 1997)).

The Board's findings of fact are reviewed under the substantial evidence standard. Section 10(e) of the Act (29 U.S.C. 160(e); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Perdue Farms 144 F.3d at 835. With respect to the Board's credibility determinations in particular, those findings will be sustained unless they are "patently unsupportable." See, e.g., Traction Wholesale Center Co. Inc. v. NLRB, 216 F.3d 92, 99 (D.C. Cir. 2000) ("Traction Wholesale").

B. Sales Manager Tofilski Coercively Interrogated
and Threatened Employees

Overwhelming evidence supports the Board's finding (A 80, 96) that Sales Manager Tofilski coercively interrogated employee Brackenrich. As shown in the Facts, pp. 10-11, Tofilski approached Brackenrich, who had not openly shown her union sympathies, and proceeded to express knowledge about her union activity and inquire into the reasons for that activity. Given Tofilski's high-ranking position in the Company, his failure to communicate any valid purpose for his questioning, and his failure to provide any assurances against reprisals, the Company cannot seriously dispute the Board's findings that Tofilski created the impression that the Company was surveilling employees' union activities and that his questioning constituted coercive interrogation.

Moreover, Tofilski not only failed to provide Brackenrich with assurances against reprisals, but, in a series of encounters, Tofilski threatened her and employees Beck, Brackenrich, Tjernlund, and Benkert with serious, adverse consequences should the Union win the election. As shown in the Facts, pp. 9-13, those reprisals included threats of increased truck inspections, decreased income, sale of the truck routes, and closure of the Company. The Board reasonably found that

Tofilski's unambiguous threats constituted clear violations of the Act. See cases cited above.

Tofilski's repeated statements that he would lie about his actions, and his specific questioning of Brackenrich and Benkert as to why the employees were keeping quiet about their union activity, belies the Company's frivolous assertion that Tofilski was engaged in mere "casual banter," and that his actions took place during a time period when the employees were openly discussing the Union. As Brackenrich testified, the Union "was a very hush-hush thing," and employees panicked when Tofilski displayed his knowledge of employees' union activities: "when he approached me and started to discuss the union with me, I was just shocked." (A 78 n.7; 1341-43.)

The administrative law judge did observe (A 78) that Tofilski was "friendly and jocular" during one encounter with Brackenrich. The judge explained (A 78), however, that the change in tone came after Tofilski asserted that he had received training as to what he could say. Moreover, even during that encounter, Tofilski made several threats. See pp. 12-13.

There is also no merit to the Company's argument (Br 32-33) that it was not responsible for Tofilski's remarks because he was not a supervisor. The Company does not dispute the Board's additional finding (A 79-80) that Tofilski was acting as an agent of the Company when he interrogated and threatened

employees. Accordingly, the Company was responsible for Tofilski's remarks regardless of whether he was also a supervisor.

In any event, as set forth in the Facts, pp. 6-7, Sales Manager Tofilski exercised authority over routes, assignments, and overtime, all of which affected the drivers' earnings. In addition, uncontested evidence supports the judge's findings that Tofilski issued formal disciplinary notices and warnings to employees. (A 81; 316, 470-72, 474-78, 480-84, 810, 983-85, 1065, 1303-04, 1311-14, 1391-92.) Tofilski signed the disciplinary notices as "supervisor," and employees testified (A 857-58, 966-69, 982-83, 1003, 1012-14, 1259) that they thought that Tofilski was part of management. Indeed, President George conceded (A 759) that Tofilski "assisted him as a supervisor," and Tofilski himself acknowledged (A 1316-17, 1352, 1358, 1368) that he considered himself part of management, and expected drivers to follow his directions. Accordingly, the Board's finding that Tofilski was a supervisor is amply supported.

C. President George Interrogated Employee Bowman,
Threatened Employees with a Change in Their
Lease Status, and Unlawfully Increased the Wage
of Employee Kassouma

Substantial evidence supports the Board's finding (A 83 n. 19, 96) that President George interrogated employee Bowman when she told him who had given her an authorization card and that

she had signed it. Their encounter was a one-on-one meeting in George's office. George failed to communicate a valid purpose for meeting with her or for his inquiries. See Perdue Farms, 144 F.3d at 835. Nor did George provide Bowman with assurances against reprisals. Id.

The Company's contention (Br 34) that President George's questioning of Bowman could not constitute an interrogation because she met with him at the suggestion of a fellow employee is unpersuasive. As the Board explained (A 82 n.19), it is likely that a one-to-one meeting between a brand new hire and the Company's president to discuss the employee's signing a union authorization card would intimidate the employee. Indeed, Bowman's account of the card signing conveys the sense that she was uncomfortable with the meeting and felt compelled to assure George that she was not really a union supporter. (A 80, 83; 1613-15, 1633.)

The Board also reasonably found (A 72, 82) that President George threatened the lease operators with adverse consequences if they voted for union representation. George told them that they would have "difficulty" maintaining their lease relationship and having a union contract that contained wages and benefits. The Board reasonably interpreted George's statement as a threat to change the lease operators' status and to reduce their income to the level of the hourly employees if

they voted for the Union. The Board's interpretation of George's comment is particularly reasonable when it is viewed in conjunction with Sales Manager Tofilski's threats that the Company would not provide employees with benefits, and that the lease drivers would get "fucked" if they voted for union representation.

Relying on Board Member Hurtgen's dissent, the Company asserts (Br 36-37), that President George was simply indicating his view that the lease drivers were independent contractors who could not have union representation. That assertion is not persuasive. The Company's interpretation of George's statement is inconsistent with its having just entered into the election agreement, which included the lease drivers as part of an appropriate unit of employees. Given that stipulation, it is reasonable to infer that George was referring to the drivers' status as lease drivers, not as independent contractors. The Board reasonably found (A 72) that a message to the lease drivers that choosing a union relationship would "undermine their relationship" with the Company would have a coercive effect.

The Board also reasonably found (A 82) that the Company violated Section 8(a)(1) of the Act when, 3 weeks before the election, President George increased cook Kassouma's pay and encouraged her to vote against the Union. See Perdue Farms, 144

F.3d 830, 835 (D.C. Cir. 1998). The Company has provided no basis for overturning the administrative law judge's credibility findings, affirmed by the Board, in which the judge specifically discredited George's testimony that the raise was part of a regularly scheduled increase.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE BENKERT, LAYING OFF EMPLOYEE BECK, AND BY SELLING ITS HOT TRUCK OPERATIONS

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) bans "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging or taking other adverse action against an employee for engaging in activity in support of union representation. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-398 (1983). Accord Traction Wholesale, 216 F.3d 92, 99 (D.C. Cir. 2000). Similarly, an employer violates Section 8(a)(3) and (1) of the Act by partially closing or altering its business operations in order to deprive its employees of the statutory right to union representation or to avoid a statutory bargaining order. See NLRB v. Amber Delivery Service, Inc., 651 F.2d 57, 64-66 (1st Cir. 1981); United Dairy Farmers Cooperative

Association v. NLRB, 633 F.2d 1054, 1063 (3d Cir. 1980); NLRB v. Kelly & Picerne, Inc., 298 F.2d 895, 897 (1st Cir. 1962).

The General Counsel has the initial burden of showing that union activity was a substantial or motivating factor in the employer's decision; once that burden is met, a violation will be found unless the employer demonstrates that it would have taken the same action even in the absence of the protected conduct. NLRB v. Transportation Management Corp., 462 U.S. 393, 400, 402-403 (1983). Accord Traction Wholesale, 216 F.3d 92, 99 (D.C. Cir. 2000).

The question of an employer's motivation for discharging an employee is a question of fact, to be decided by the Board in the first instance. See Passaic Daily News v. NLRB, 736 F.2d 1543, 1551-1552 (D.C. Cir. 1984). Because an employer will rarely concede unlawful motive, the Board may infer discriminatory motivation from circumstantial as well as direct evidence. Id.

On review, the Board's finding of unlawful motive must be upheld if it is supported by substantial evidence. Moreover, as this Court has explained, "We are even more deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial." Traction Wholesale, 216 F.3d 92, 99 (D.C. Cir. 2000).

B. The Board Reasonably Determined that the
Company Discharged Benkert and Laid Off Beck
Because of Their Protected Union Activities

The Company does not dispute that the Board established a prima facie case that the Company's hostility to the Union was a motivating factor in its discharge of Beck and Benkert. Indeed, the record plainly demonstrates that significant considerations supporting an inference of unlawful motivation--union activity, employer knowledge, anti-union animus, timing, and shifting explanations are all present in the instant case.³

Thus, the Company does not dispute the Board's finding that Beck and her cook, Benkert, actively supported the Union, and that the Company was well aware of their union sentiments at the time it discharged them. The Company correctly surmised that Beck was the individual who contacted the Union, and, as Company President George acknowledged (A 761), Beck was an outspoken proponent of the Union during the Company's preelection meetings. President George and Sales Manager Tofilski were well aware of Beck's and Benkert's union activity,

³Although the Company claims (Br 14) that the Board failed to show that Benkert's union support was a motivating factor in her discharge, it relies primarily on her job performance for that claim. Benkert's allegedly unsuccessful job performance, however, does not undermine the Board's finding that antiunion considerations were a motivating factor in the Company's discharge of Benkert. Instead, her job performance is relevant to the question whether the Company has established that it would have taken the same action absent its union animus. As shown below, the Company has failed to meet that burden.

which included attending union meetings and distributing union authorization cards to other employees. See Traction Wholesale, 216 F.3d 92, 99 (D.C. Cir. 2000).

The Company's numerous threats and other coercive statements, including threats aimed directly at Beck, see above pp. 13-14, 16, 20, provides particularly persuasive evidence of its animus towards the Union and its adherents. Parsippany Hotel Management Co. v. NLRB, 99 F.3d 413, 423 (D.C. Cir. 1996). The timing of the discharges--shortly after the election, during the pendency of the Union's objections to the election, also supports the Board's finding of unlawful motive. Traction Wholesale, 216 F.3d 92, 99 (D.C. Cir. 2000). See also McLane Western v. NLRB, 827 F.2d 1423, 1424-25 (10th Cir. 1987).

Finally, the Company provided shifting explanations for discharging Benkert. Thus, it is undisputed that when President George informed Benkert of her discharge, he referred solely to her failure to punch out in a timely fashion. Before the Board, however, the Company contended that it discharged her shortchanging customers on food portions and overall poor work performance, as well as the timeclock issue. It is well settled that the Board may rely on such shifting explanations, and the failure to mention the newly asserted reason at the time of the discharge, as indicating a discriminatory motive. NLRB v.

Dorothy Shamrock Coal Co., 833 F.2d 1263, 1268 (7th Cir. 1987);
American Sewing Co. v. NLRB, 578 F.2d 251, 255 (9th Cir. 1978).

C. The Company's Arguments that It Terminated
 Benkert and Laid Off Beck for Reasons Unrelated to
 Their Union Activity Are Without Merit

1. Benkert

The Board reasonably found that neither Benkert's timeclock violation (see, above pp. 19-20) nor her overall work performance compelled a finding that the Company would have discharged Benkert even in the absence of her union activity. In the first place, no company rule required the Company to discharge Beck for her second timecard violation, and the Company does not dispute the Board's finding (A 72, 83) that it was generally a very tolerant employer. As President George (A SA 18) acknowledged, the Company "very seldom" terminated employees, and Tofilski (SA 4) similarly testified that the Company had a practice of "almost never" firing anyone.

In this instance, however, the Company chose not simply to discipline Benkert, but to discharge her, thereby imposing "the industrial equivalent of capital punishment." Metz v. Transit Mix, Inc., 828 F.2d 1202, 1209 (7th Cir. 1978). See generally NLRB v. Delta Gas, Inc., 840 F.2d 309, 311 (5th Cir. 1988) ("no evidence that the employer even considered the use of lesser sanctions)."

Moreover, as the Board noted (A 72), although the Company gave a letter to Benkert after her first clocking out infraction, stating that her conduct would "not be tolerated," it issued her no formal disciplinary warning and did not warn Benkert that she faced discharge if she engaged in the same conduct again. The Company's failure to warn Benkert of possible discharge stands in stark contrast to the Company's treatment of other employees who it repeatedly warned of possible discharge for a repeated offense. Equally important, as the Board explained (A 72), on other occasions when the Company issued a formal disciplinary warning threatening an employee with discharge for a repetition of the offense, the record shows that the Company failed to terminate the employee even when the conduct was repeated.

For instance, cook Eric Brown received 3 written warnings within 2 months between September and November 1995 for keeping cooked food for too long. In one instance the Company gave Brown a written warning for repeating the same food-handling problem that the Company had orally warned him about earlier that day. All of Brown's written warnings stated that a recurrence subjected him to discharge. The Company, however, took no additional disciplinary action, despite the possibly serious health consequences of his actions. (A 83; 620-34) The administrative law judge (A 83, 84; 635-60) documented the

Company's similar treatment of employees Virginia Carter and Mark Turner, both of whom received numerous warnings for misconduct. In light of the Company's conduct with respect to those employees, the Board was well warranted in finding disparate treatment by the Company respecting Benkert.

Finally, the Board reasonably rejected the Company's belated attempt to rely on three warnings that it issued Benkert in the summer and fall of 1996, well before her discharge. The warnings that the Company relies on (Br 12-13, A 72, 83, 693-95, 1007-11) were for alleged incidents of "portion control": giving the customers smaller portions than required, not, as the Company claims, for providing the Company with false reports of the number of hamburger sales. In any event, the Company does not dispute the Board's finding (A 84) that the Company failed to show that Benkert actually shortchanged customers.

In sum, the Board reasonably inferred (A 72, 84-85) that in light of the Company's animosity towards unionization, the severity of the penalty imposed on her, and the Company's treatment of other employees in comparable situations, the Company failed to carry its burden of showing that it would have discharged Benkert in the absence of her union activities.

2. Beck

The Board also reasonably found that the Company failed to show that it would have laid off Beck absent her union activity.

In the first place, as shown below, pp. 44-45, the Board reasonably found that the sale of Beck's route to Cummins was a sham. Moreover, even absent the sale, the Company has not provided a legitimate basis for its failure to offer Beck an available job with JK Foods as a cold truck operator.

Thus, the Company does not dispute the Board's finding (A 85) that President George retained significant control over the operations of JK Foods, or its finding (A 85) that JK Foods had catering routes available. Indeed, just one day before her layoff, the Company on behalf of JK Foods had placed a newspaper advertisement for route drivers.

The Company suggests (Br 14) that differences exist between the jobs, but provided no evidence to support such a claim. In any event, the Company has not shown that Beck was unqualified to drive a cold truck. Equally important, the Company does not dispute the Board's finding (A 86) that "her performance was as good or better than most of [the Company's] drivers/cashiers." Indeed, George admitted (A 86; 1873, 1877) that Beck was one of his best drivers, and rated her skills in all categories as average or better in a job evaluation he filled out on the day he discharged her (A 582).

D. The Board Reasonably Found that the Company's
Ostensible Sale of its Hot Truck and Routes
Was an Unlawfully Motivated Sham

As shown in the Facts pp. 16-24, after the election, the Company ostensibly sold all of its hot trucks and truck routes either to former company employees or former supervisors. After the sales, the Company terminated the employment of all its drivers and cooks, who, with the exception of Beck, were thereafter hired by the purchasers. The record amply supports the Board's finding that the Company's hostility to the Union was the reason for those sham sales.

The Company's numerous unfair labor practices prior to the sale, along with the timing of the sale strongly indicate unlawful motivation. Moreover, as the judge noted (A 88), Sales Manager Tofilski's repeated threats that President George would sell the Company, as well as company attorney Mamat's statement, prior to signing a stipulated election agreement, "strongly suggests that the sale of the hot trucks was indeed related to the union campaign."

Finally, as the judge further explained (A 88), "the nature of the transactions themselves are a further indication that that they [were] a sham motivated by a desire to thwart the union." Thus, the evidence shows that the Company, which did not require any downpayments from the purchasers, structured the

"sales" in a manner that left the purchasers with payments virtually identical to those previously paid by the lease drivers, and the Company continued to retain near-total control over the purchasers.

Among other factors noted by the judge (A 87-89), the sales agreements required the buyers to purchase all of their food from the Company, and required them to operate the same routes, and in the same manner, as they were run prior to the sale. The agreements also prevented the buyers from selling or assigning the routes. Moreover, in general, the trucks continued to carry the Company's logo, telephone number, and price board; the purchasers continued to service the very same customers, selling the food at the Company's "suggested" prices. In addition, drivers hired by the purchasers paid their "lease fees" to the Company, not the purchasers, with the Company using the fee to pay the purchasers' loans. As purchaser Cummins explained: "I never really actually had any money in my hand. . . . [I]t's just on paper." (A 1116.)

In addition, as shown in the Facts, many of the "sales" were consummated well after the purchasers began operating the trucks, and the agreements permitted some of the purchasers to void the sales thereafter. The Company's control over both the sales and the subsequent operations of the hot truck operations provides compelling evidence that the transactions were not at

arms length, but instead contrived by the Company as a means of avoiding its obligations and responsibilities under the Act.

See Fugazy Continental Corp v. NLRB, 725 F.2d 1416, 1418 (D.C. Cir. 1984).

The sales to Tofilski, Merollis, Schemanske, and Kurzwa were particularly irregular. Thus, there is no evidence that Schemanske has ever made any loan payments to the Company. Kurzwa bought a route that Cummins returned, but there was no change in the terms, despite the fact that Cummins had returned the route because she was not making money. With respect to Tofilski and Merollis, the record shows that the Company publicly announced the sales to them 4 months before they signed contracts to purchase the routes. As Tofilski acknowledged (A 1298), he did not know why President George announced the sale, as no money had changed hands, and he did not yet consider himself the owner of the routes.

Additionally, the Company does not dispute the judge's finding (A 88) that, unless the purchaser operated a single route only, and worked on that route herself-- a set-up just like the lease operators prior to the sales-- "it is not clear that any of them have been able to run them profitably." Indeed, the record evidence indicates otherwise, as both Cummins and Tofilski returned routes, and Schemanske, as noted, has not made any payments to the Company. All of those facts lend

further support to the judge's finding, affirmed by the Board, that the sales were mere paper transactions. See Fugazy, 725 F.2d 1416, 1418 (D.C. Cir. 1984).

The Board also reasonably rejected the Company's claims (Br 19-20) that it sold the hot truck routes for reasons unrelated to the union campaign, primarily, President George's health problems. Although President George had heart surgery in 1981 and 1989, the Company does not dispute the judge's finding (A 87), that it failed to show any connection between those problems and the Company's operations afterwards. The Company's other claim--that a wholesale business is easier to administer--is belied by the fact that the Company retained and exercised substantial control over the day to day operations of the hot truck operations after the sale.⁴

The judge did note (A 87) that the Company's sale of the cold trucks months prior to the union organizing campaign provided some support for the Company's claim that it had desired to exit the retail business, but reasonably found "this

⁴ At the hearing, Laura George claimed (A 1588-89) that the Company sold the routes to pay for the building expansion. The expansion, however, started six months prior to the first sale, and she later conceded (A 1715) that the Georges' used their own money for the down-payment. The "presentation of implausible or shifting explanations for the [Company's action] is a factor suggesting discrimination against union activity" rather than legitimate business reasons. NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). Accord NLRB v. Nevis Industries, Inc., 647 F.2d 905, 910 (9th Cir. 1981).

evidence . . . outweighed by other factors." Thus, based primarily on credibility determinations, which the Company no longer disputes, the judge found (A 87-88, and n.36) that the Company made no bona fide attempt to sell the hot trucks and hot truck routes prior to its learning of the union campaign.

Moreover, as the judge reasonably explained (A 87), the Company's claim that it had long contemplated the sale of the hot truck routes for legitimate business reasons is inconsistent with (1) its subsequent expansion, (2) its vigorous anti-union campaign (see Fugazy, 725 F.2d 1416, 1418 (D.C. Cir. 1984), and (3) its purchase of a hot truck route from independent driver Karras at the same time it purportedly was exiting the retail business. In these circumstances, the Company's reliance on LCF, Inc. v. NLRB, 129 F.3d 1276 (D.C. Cir. 1997), is misplaced. In that case, the employer established intent, based on financial reasons, to close a facility for reasons unrelated to the union campaign.

IV. THE BOARD ACTED WITHIN ITS DISCRETION IN ORDERING THE COMPANY TO BARGAIN WITH THE UNION AND TO RESTORE ITS OPERATIONS AS A REMEDY FOR ITS UNFAIR LABOR PRACTICES

A. Applicable Principles and Standard of Review

The Board's remedial authority under Section 10(c) of the Act (29 U.S.C. § 160(c)) is extremely broad: a Board remedial order must be upheld unless it represents "a patent attempt to

achieve ends other than those which can fairly be said to effectuate the policies of the Act.” Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). In NLRB v. Gissel Packing Co., 395 U.S. 575, 610, 613-614 (1969) (“Gissel”), the Supreme Court upheld the Board’s authority to issue a remedial bargaining order where an employer has committed unfair labor practices that “have the tendency to undermine majority strength and impede the election processes.” Under Gissel, a bargaining order is appropriate if the union seeking recognition once possessed an authorization card majority, and “[i]f the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order” Id. at 614-615. Accord Traction Wholesale v. NLRB, 216 F.3d 92, 103 (D.C. Cir. 2000).

The Board’s determination that a bargaining order should issue derives from the Board’s own particular “fund of knowledge and expertise . . . , and its choice of remedy must therefore be given special respect by reviewing courts.” Gissel, 95 U.S. at 612 n.32. Accord Traction Wholesale, 216 F.3d 92, 104 (D.C. Cir. 2000). Similarly, a Board remedial order directing an employer to resume a portion of its operations must stand,

unless the employer can establish that, as an economic matter, compliance is unduly burdensome. See O'Dovero v. NLRB, 193 F.2d 532, 537-539 (D.C. Cir. 1999).

B. The Board Acted Well Within Its Discretion
in Ordering the Company To Bargain with the Union

1. The Union obtained a card majority

The record shows that the Union established majority status on July 3, 1996, when it requested representation, as 18 of the 33 employees in the appropriate unit had signed authorization cards. The Board reasonably rejected the Company's contention (Br 39-43) that the appropriate unit contained additional employees, a number sufficient to establish the Union did not have majority support. Indeed, as we show, the Company's various assertions amount to little more than grasping at straws.

In the first place, the Board reasonably found (A 90) untimely the Company's assertion that the stipulated election agreement included the Company's two clerical employees; the Company raised that contention for the first time before the Board in the unfair labor practice proceeding. See Schoolman Transportation v. NLRB, 112 F.3d 519, 519-20 (D.C. Cir. 1997). In any event, to the extent that the stipulated election agreement was ambiguous, the Board reasonably found from the surrounding evidence that there was no intent to include the

office clerical employees, and that they did not share a community of interest with the unit employees. (A 90; 1585-87, 1589-90, 1859-61, 1911-15, 1924-27, 1930-31.) See Associated Milk Producers, Inc. v. NLRB, 193 F.3d 539, 539-43 (D.C. Cir. 1999).

Similarly, the Company's claim that the Board improperly excluded Store Supervisor Steve Barney and Line Supervisor Ross Canfield from the bargaining unit is also untimely. Thus, neither position was included in the stipulated bargaining unit, neither employee voted in the election (SA 5-6, 9-10), and the Company raised its claim for the first time before the Board in the unfair labor practice proceeding. In any event, the Board reasonably found that Barney and Canfield exercised sufficient independent judgment to classify them as Section 2(11) supervisors. The evidence shows that they had the authority to discipline, to direct the work of others, and to prepare performance evaluations. (A 91; 510-25, 1435, 1442-43, 1475, 1477-78, 1483, 1485-87, 1491, 1496-1503, SA 7-8.) The Company designated them as supervisors, and they received different benefits from employees included in the unit. (A 510-21, 1435-37, 1443-46, 1484, 1489-90, 1492, 1494-95, 1497.)⁵

⁵ The Board, relying on testimony and the Company's own records, reasonably found (A 91), contrary to the Company's claim, that Barb Paquette, Adrienne Kaufman, Barry Karras, and Dawn Alman were not members of the bargaining unit. The record shows that

The Board (A 91) also reasonably rejected the Company's challenge to the validity of Scott Staley's and Mike Konkell's authorization cards. The Company does not dispute that a card can be authenticated by someone other than its signer. See Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 419 F.2d 1207, 1208 (D.C. Cir. 1969), cert. denied 397 U.S. 988 (1970). Here, the employees that gave Staley and Konkell the cards authenticated them. The Company has provided no basis for overturning the judge's findings crediting their testimony. (A 72, 92; A 1253-57, SA 1-3.)

2. The Board Reasonably Concluded that the Company's Unfair Labor Practices Rendered Slight the Possibility of Ensuring a Fair Election Through the Use of Traditional Remedies

As shown, a bargaining order must be supported by a finding that the employer's unfair labor practices had a tendency to undermine the Union's majority. Here, adopting the judge's determination that a bargaining order was appropriate, the Board (D&O 2) reasonably found "that the [Company's] course of conduct, both before and after the election, clearly demonstrates that the holding of a fair election in the future

Paquette was not a full-time employee until after the election (A 665), and further shows that the Company terminated Kaufman several months before the election (A 697). The record also shows that, prior to the election, Karras was an independent driver, not a company employee, and that Alman was employed by Karras as his cook. (A 661-65, 733-34, 1856, 1862-67, 1878-79, 1889, 1903-08, 1978-81, SA 19-37.)

would be unlikely and that the 'employees'' wishes are better gauged by an old card majority than by a new election."

As the Board explained (A 73), the Company engaged in such "hallmark violations" as threatening pay cuts, job loss, and plant closure. Threats of job loss and plant closure are demonstrably "more effective [in] destroying election conditions for a longer period of time than others." NLRB v. Gissel Packing Co., 395 U.S. 575, 611 n.31 (1969). Moreover, those threats play a role in the imposition of a bargaining order not only because of their impact on those who directly experienced them, but also because it may be fairly assumed that the Company's misconduct was repeatedly disseminated among employees. See NLRB v. Air Products and Chemicals, Inc., 717 F.2d 141, 146 (4th Cir. 1983)

Equally, if not more important, shortly after the election, the Company proceeded to carry out its threats: it discharged two leading union adherents, and engaged in the sham sale of its entire hot truck operation, leading to the discharge of all its drivers and cooks--virtually the entire unit. As the Board explained (A 73), "such conduct goes to the very heart of the Act and is not likely to be forgotten. . . . [The Company's conduct] "sends employees the unequivocal message that it was

willing to go to extraordinary lengths in order to extinguish the union organizational effort."

In addition to the foregoing violations, the Board noted (A 73) that the Company "also committed numerous other serious and pervasive unfair labor practices," such as interrogating employees, creating the impression of surveillance, threatening employees with increased truck inspections, and suggesting that it was futile to unionize. Those violations provide further support for the Board's bargaining order.

As the Board further observed (A 73), the impact of the Company's violations was heightened by the fact that the unit was small, and the perpetrators of the unfair labor practices were the Company's owner, President George, and a high-ranking company representative, Sales Manager Tofilski. The participation by high-ranking company officials heightens the coercive impact of the unfair labor practices, because it reinforces the fact that the coercion reflects official company policy. See Electrical Products Division of Midland-Ross Corp. v. NLRB, 617 F.2d 977, 987 (3d Cir.), cert. denied, 449 U.S. 871 (1980); Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 510 (7th Cir. 1980). Accordingly, the effects of such misconduct are much less likely to dissipate; as a result, such misconduct decreases the likelihood that a free and fair rerun election can

be held. See Ron Tirapelli Ford, Inc. v. NLRB, 987 F.2d 433, 441 & n.10 (7th Cir. 1993).

Finally, as shown in Facts, in the weeks leading up to the election, company officials made sure that employees learned that the Company had previously shut its doors to avoid unionization, and that it would not hesitate to do so again. The Company has now shut its doors twice; employees might justifiably be reluctant to vote for the Union again.

In short, the Company engaged in a continuing violation of its employees' rights, beginning with threats of plant closure and other adverse consequences, continuing with the interrogation of employees, and culminating in the discharge of two union leading adherents and the sham sale of the Company's hot truck routes. The Board reasonably determined that the combined effect of those actions was sufficiently serious and pervasive to have the tendency to undermine the Union's majority support and impede the election process.

Contrary to the Company's contention (Br 39), the judge (A 94-95), as upheld by the Board (A 73-74), fully considered whether a rerun election was an appropriate remedy, and weighed the employees' Section 7 rights before finding that a bargaining order was appropriate. Moreover, in light of the Company's repeated threats and sham sale--which itself led to the discharge of approximately 24 employees--the Company's claim

that it did not engage in "broad intimidation" is equally unavailing. In any event, drastic unfair labor practices, such as mass discharges, are not required before the Board can issue a Gissel bargaining order. See, for example, Traction Wholesale, 216 F.3d 92, 105-106 (D.C. Cir. 2000) (Board "easily satisfied" standards for imposing bargaining order where employer interrogated employees, threatened to close, and fired a key union supporter.)

Finally, given the Company's acknowledgment (Br 45) that the employee turnover that occurred prior to the unfair labor practice proceeding was the direct result of its own unlawful sales of the trucks and truck routes, it cannot, as the Board explained (A 74), rely on that conduct to avoid the imposition of a bargaining order. See NLRB v. Gordon, 729 F.2d 29, 34 (2d Cir.) ("it would defy reason to permit an employer to deflect a Gissel bargaining order on the ground of employer turnover when the turnover has resulted from the employer's unlawful discharge[s]"), cert. denied, 479 U.S. 931 (1986).

C. The Company Has Not Established that a
Restoration Order Is Unduly Burdensome

In view of Company's sham sell-off of the hot trucks, resulting in the discharge of approximately 24 employees, the Board reasonably ordered Company to restore the status quo ante, by reinstituting that portion of its operations. To fail to do

so would leave the employees without a remedy, and would give the Company the benefit of its unlawful acts.

Moreover, the Company has provided no support for President George's claim that the Board's restoration order--requiring the Company to reinstate its hot truck operations--is unduly burdensome. Although the Company cites (Br 28; A 1818-23) President George's estimate that restoration would cost \$750,000, it introduced no evidence providing a basis for George's self-serving, unsubstantiated testimony. Accordingly, the Company has fallen far short of establishing that compliance with the Board's order is unduly burdensome. See, e.g., O'Dovero, 193 F.3d at 537-39.

In any event, the evidence strongly suggests that compliance with the Board's order would not be unduly burdensome. To the contrary, as shown, the Company's day-to-day operations did not change as a result of the hot truck sales. The trucks are still housed at the Company and the route operators continue to operate under the Company's rules; they continue to sell the same food at the Company's "suggested" prices.

Moreover, the Company has already shown flexibility, allowing Cummins and Tofilski to simply return routes, and by running at least one of the routes that Tofilski returned. In addition, several of the contracts and supply agreements suggest

that the Company would not be unduly burdened by a restoration order. Thus, several of "Purchase Agreement[s]" contain a section titled "Cooperation and Access," providing that the Company and "purchaser shall cooperate fully with each other . . . with respect to any claims, demands . . . suits, actions and proceedings by or against [the Company] or Purchaser. (A 163, 259, 327, 388.) Similarly, several of the supply arguments contain a section entitled "Non-Performance," providing that "[e]ach of the parties shall be excused from the performance of their obligations in the event such performance is prevented by a cause beyond the reasonable control of such party, including . . . regulation or law of any government or agency thereof. . . ." (A 173, 366, 405.)

B. The Company's Remaining Contentions Are Without Merit

There is no merit to the Company's contention that the lease drivers who it employed prior to the sham sales were independent contractors, and therefore not entitled to reinstatement. Not only did the Company stipulate that they were unit employees for election purposes, but the facts clearly establish that they are employees under Section 2(3) of the Act (29 U.S.C. 152(3)). Thus, applying the "right-to-control test" (see North American Van Lines, Inc. v. NLRB, 869 F.2d 596, 598, 599 (D.C. Cir. 1989), and City Cab Co. of Orlando, Inc. v. NLRB, 628 F.2d 261, 264 (D.C. Cir. 1980)), the record shows that

nearly all aspects of the drivers' day-to-day work performance were subject to the same company direction, supervision, and control as the hourly drivers' performance. For instance, the lease drivers, like the hourly drivers, reported every day to the Company's facility, where all of the trucks were stored and maintained. Thereafter, they sold food purchased from the Company, to customers assigned by the Company, at locations, times, and prices specified by the Company.⁶ The evidence further reflects that the Company unilaterally controlled and altered the drivers' schedules, treating them as one single group of employees. Even if a lease driver acquired a new customer, the Company had complete discretion as to who would service the customer. (A 813-16, 838-42.) See NLRB v. Amber Delivery Service, Inc., 651 F.2d 57, 62-63 (1st Cir. 1981) (employer's assignment of drivers to a specific geographic area and freedom to reassign that area, as well the drivers' lack of

⁶ In disputing the Board's finding that the lease and non-lease drivers sold food at the same prices, the Company (Br 31) mischaracterizes the cited testimony of lease drivers Tjernlund and Pape. Both of those drivers testified that Sales Manager Tofilski or President George instructed them not to change the Company's price list. (A 907-09, 914, 950-51.) Moreover, in light of the evidence showing that customers received a copy of the Company's price list (A 1848), that routes overlapped, and that drivers were occasionally reassigned to different routes and customers, failure to have charged the same prices would have caused obvious customer problems.

freedom to refuse loads, support finding that drivers are employees).

By dictating the drivers' schedules and unilaterally altering their lease rates, the Company also exerted significant control over their earnings. As shown, the lease drivers earned money based on what they sold, minus the cost of food, the lease fee, cook fee, and other service fees and taxes. Therefore, their earnings were directly related to the number of customers assigned to them, the time of day that they serviced those customers, and their lease fees. This company control over the lease drivers' income strongly supports the Board's finding that they were employees: it demonstrates that the drivers did not, in fact, act like entrepreneurs whose profits depended on their own business decisions. See Herald Company v. NLRB, 444 F.2d 430, 434-435 (1st Cir.), cert. denied, 404 U.S. 990 (1971).

In addition, the drivers were required to work exclusively for the Company. They drove trucks owned by the Company that bore the Company's name and phone number, and used cooks supplied by the Company. The Company even assigned overtime routes for drivers, without making any distinction between the lease and hourly drivers. The Company not only prohibited the lease drivers from selling or assigning "their" routes, but prevented them even from using a substitute driver or cook that was not approved by the Company.

In short, the foregoing facts demonstrate that the Company exerted significant control over the manner and means by which the drivers performed their jobs, and that the drivers lacked "the unfettered freedom of operation, characteristic of the entrepreneur." NLRB v. Pepsi Cola Bottling Co. of Mansfield, Ohio, 455 F.2d 1134, 1141 (6th Cir. 1972). In light of that pervasive control, the Company's failure to withhold taxes or provide benefits for the lease drivers, although relevant, does not compel a different finding. See NLRB v. Amber Delivery Service, Inc., 651 F.2d 57, 61 (1st Cir. 1981), NLRB v. Keystone Floors, Inc., 306 F.2d 560, 561, 563 (3d Cir. 1962).⁷

⁷Contrary to the Company's contention (Br 16-18), employees Beck and Benkert are entitled to reinstatement regardless of whether or not the judge credited all of their testimony. ABF Freight Systems, Inc. v. NLRB, 510 U.S. 317, 321-25 (1994).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

PETER WINKLER
Supervisory Attorney

DAVID A. SEID
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
(202) 273-2982
(202) 273-2941

LEONARD R. PAGE
Acting General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTONG
Deputy Associate General Counsel

National Labor Relations Board
January 2001

t:\acbcom\georgebrf.#pw

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOUGLAS FOODS CORP.	:	
	:	
Petitioner/Cross-Respondent	:	
	:	
v.	:	No. 00-1241
	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case No. 7-CA-38788
	:	
Respondent/Cross-Petitioner	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Board's final brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below.

Theodore R. Oppewall
Jeffery M. Peterson
Kienbaum Oppewall Hardy
& Pelton, P.L.C.
325 South Old Woodward Avenue
Birmingham, MI 48009

RULE 32 CERTIFICATION

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, the undersigned certifies that the Board's brief contains 13,706 words.

Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Dated at Washington, D.C.
this 5th day of January, 2001